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Supreme Court of the United States

OCTOBER TERM, 1947

No. 818 - 826 (See 802-803)

LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., Petitioner, vs. MISSISSIPPI VALLEY BARGE LINE COMPANY, Respondent.

GEORGE MONTGOMERY, State Tax Collector, etc., Petitioner, vs. MISSISSIPPI VALLEY BARGE LINE COMPANY, Respondent.

LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., Petitioner, vs. AMERICAN BARGE LINE COMPANY, Respondent.

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GEORGE MONTGOMERY, State Tax Collector, etc., Petitioner, vs. AMERICAN BARGE LINE COMPANY, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans,

Louisiana, and George Montgomery, State Tax Collector for the Parish of Orleans, State of Louisiana, in their respective official capacities, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on March 5, 1948, which said judgment held that the tugboats and barges of Mississippi, American and Union Barge Lines had acquired no tax situs in Louisiana and that no tax could be legally assessed and collected by that State or by the City of New Orleans.

JUDGMENT OF CIRCUIT COURT OF APPEALS.

The judgment of the United States Circuit Court of Appeals was entered on March 5, 1938, and a rehearing was refused on April 13, 1948, and reported as: "Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. Mississippi Valley Barge Line Company, Appellee, No. 12,117; George Montgomery, State Tax Collector for the City of New Orleans, Appellant, vs. Mississippi Valley Barge Line Company, Appellee, No. 12,118; Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. American Barge Line Company, Appellee, No. 12,119; George Montgomery, State Tax Collector for the City of New Orleans, Appellant, vs. American Barge Line Company, Appellee, No. 12,120; Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. American

Barge Line Company, Appellee, No. 12,121; Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. Mississippi Valley Barge Line Company, Appellee, No. 12,122; Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. Union Barge Line Corporation, Appellee, No. 12,123; George Montgomery, State Tax Collector for the City of New Orleans, Appellant, vs. Mississippi Valley Barge Line Company, Appellee, No. 12,125; George Montgomery, State Tax Collector for the City of New Orleans, Appellant, vs. American Barge Line Company, Appellee, No. 12,126"; and were all consolidated for trial, briefing and argument, with separate judgments entered in each case.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Section 1, 43 Stat. 938 (28 U. S. C. A. Section 347).

SUMMARY STATEMENT OF MATTER INVOLVED.

The State of Louisiana and the City of New Orleans levied an *ad valorem* tax against the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation, on a portion of their tow-boats and barges, for the years 1944 and

1945, under Act 152 of 1932, as amended by Act 59 of 1944 of the Legislature of Louisiana. This Statute gives to the State of Louisiana and the City of New Orleans the right to levy these *ad valorem* taxes on a portion of this watercraft in the ratio which the number of miles of lines of these barge line companies within Louisiana bears to the total number of miles of their entire lines.

These barge line companies paid the taxes under protest and filed suit for their recovery, in accordance with the provisions of Act 330 of 1938 of the Legislature of Louisiana.

The above nine cases, together with two cases of the DeBardeleben Coal Corporation, were consolidated for trial in the United States District Court, with one opinion being rendered and separate judgments entered in each case. The District Court held that in the above nine cases, this watercraft had acquired no tax situs in Louisiana, and that in the DeBardeleben cases, Louisiana had the right to the entire tax and could not tax on the proportionate basis as to mileage.

These eleven suits were appealed by the State of Louisiana and the City of New Orleans to the United States Circuit Court of Appeals for the Fifth Circuit, and were there consolidated for trial, resulting, in that Court, in judgment for the appellee barge lines in the above nine cases and in judgment for the City of New Orleans in the two DeBardeleben cases, as to the Federal questions involved.

THE QUESTION PRESENTED.

(1) The question presented is whether the levying of a tax by the State of Louisiana and the City of New Orleans on a portion of the value of the towboats and barges of these barge lines, under the pertinent sections of Act 152 of 1932, as amended by Act 59 of 1944 of the Legislature of Louisiana, violates any of the provisions of the Constitution of the United States, particularly the due process of law clause of the 14th Amendment.

(2) Whether there is a need to establish a permanent tax situs, as such, of movable property engaged as an entity in interstate commerce, which operates constantly and regularly within the State of Louisiana, in order to entitle that State to its share to these taxes in proportion to the mileage of such watercraft within and without the State, identically as allowed in the case of the rolling stock of railroads and on the equipment of other types of transportation companies engaged in interstate commerce.

(3) Whether, if such a tax situs must be established to allow a State to tax, there has not been established a tax situs as to that average number of this watercraft which is in New Orleans and Louisiana every day in the year as part of an integrated system of inland water transportation.

STATUTE INVOLVED.

The statute involved is Act 152 of 1932 of the Legislature of Louisiana, as amended by Act 59 of 1944 of the Legislature of Louisiana.

REASONS RELIED UPON FOR ISSUANCE OF WRIT.

The reasons relied upon by petitioners for the issuance of a writ of certiorari herein are that the United States Circuit Court of Appeals for the Fifth Circuit:

(A) Has decided an important question of Federal Law which has not been, but should be settled by this court;

(B) Has decided this question in such a manner as to render a Louisiana Statute inoperative and of no effect.

The Circuit Court of Appeals for the Fifth Circuit, as the basis for its decision, states:

> "But so far as we have been able to find this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways."

The question of watercraft using the high seas has never been an issue in these cases. The issue is to watercraft using navigable inland waterways in an integrated system of transportation with an average number of this watercraft in Louisiana every day in the year. The reason that the principle of tax apportionment to this inland type of watercraft has never been applied is because the issue has never been directly presented as it is here. In other words, the Circuit Court of Appeals would have been equally correct in stating that it had been unable to find where this tax apportionment principle **had ever**

been denied under the particular facts in the cases at bar. This particular type of case has never been decided by this Court, and the question is wide open for decision under the facts and the law applicable, and calls for a decision now that the issue is squarely presented to this Court.

The tax apportionment principle has been decided and allowed as to railroads, and similar types of transportation, which cases are more nearly analogous to the issues presented here rather than to the issues in the old steamship cases cited and relied upon by the United States Circuit Court of Appeals.

The Circuit Court of Appeals failed to distinguish between the cases where tax apportionment has been allowed and the cases at bar, nor can a legal or logical distinction be shown as to the tax principles involved.

Where tax apportionment has been allowed, it has never been necessary to show a permanent tax situs, as such, of this equipment, to allow a State its share of taxation.

Even if necessary to show a permanent tax situs for the purposes of taxation, this record is replete with evidence to show an average number of this watercraft in Louisiana at all times, thus clearly establishing a situs for the portion sought to be taxed.

Thus, the Circuit Court of Appeals incorrectly applied the law of situs.

The decision holds that Delaware can tax the watercraft of the American Barge Line Company and the Mississippi Valley Barge Line Company. This is contrary to established law, for Delaware is simply the resting place of the charters of these companies. No business whatsoever is conducted in Delaware and that State can afford no protection to this watercraft. The record shows that Louisiana and New Orleans offer and furnish adequate fire, police and health protection to this watercraft. This equipment cannot completely escape taxation, and under the law and the jurisprudence Louisiana and New Orleans are entitled to a fair share of these taxes.

While the Union Barge Line Corporation is a Pennsylvania corporation, and actually operated in that State, there is no Constitutional prohibition against another State taxing a portion of the movable property of such corporation, when such portion is permanently employed within such State.

In one of the more recent cases decided by this Court, *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292 (1944), the Court refused to hold that non-domiciliary States, which actually taxed a part of this aircraft, could not tax on the proportionate rule basis, holding that such question was not then before the Court. This issue is squarely presented now, and it is of extreme importance it be decided by this Court.

It is therefore respectfully submitted that, for the reasons stated herein, this petition for writ of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

We shall endeavor to be as brief and concise as possible.

The jurisdiction of this Court is invoked upon the holding by the United States Circuit Court of Appeals that the watercraft of these three barge lines "acquired no tax situs in Louisiana and that no tax could be legally assessed and collected by that State or by the City of New Orleans." While the Circuit Court of Appeals did not specifically so state, we presume it inferred that the retention of these taxes by the State of Louisiana and the City of New Orleans, violates the due process clause of the Constitution of the United States, as held by the Judge of the United States District Court, the Circuit Court of Appeals, affirming the judgment of the District Court as to these nine cases.

We shall deal then specifically with this issue.

THE TAX APPORTIONMENT PRINCIPLE HAS BEEN APPROVED BY THE SUPREME COURT OF THE UNITED STATES, WITHOUT THE NECESSITY OF SHOWING A PERMANENT TAX SITUS, AS SUCH, TO ALLOW THE STATES A FAIR SHARE OF THE TAXES.

In the many cases where tax apportionment has been allowed by this court, it has never been necessary to show that the identical movable property remained within the State's borders throughout the year.

In the case of *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 35, 35 L. ed. 613, this Court said:

> "The cars of this company within the state of Pennsylvania are employed in interstate commerce;

but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and from upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it would not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact, that instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, **without regard to the place of the owner's domicile,** could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about 100 cars within the state. (Emphasis ours.)

"The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the

whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars run, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of apportioning such a tax is sustained by several decisions of this Court in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this Court extended to the determination of the whole case, and was not limited, as upon writs of error to the State Courts, to questions under the constitution and laws of the United States."

In the earlier case of *Marye vs. Baltimore and Ohio Railroad Co.*, 127 U. S. 117, 8 S. Ct. 1037, this Court had occasion to observe:

"It is not denied, as it cannot be, that the state of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the situs of the Baltimore & Ohio Railroad Company is in the state of Maryland, that also, upon general principles, is the situs of all its personal property; **but for purposes of taxation,** as well as for other purposes, that **situs** may be fixed in **whatever locality** the **property** may be **brought and used by its owner by the law of the place where it is found.** If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there **habitually to use and employ** a portion of its movable personal property, and the railroad com-

pany chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, **its fair share of the burdens of taxation** imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an **appraisement and valuation of the average amount of the property thus habitually used,** and collected by distraint upon any portion that might at any time be found. . . . "the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." (Emphasis ours.)

In both the *Marye* Case (1888) and the *Pullman's Palace-Car Co.* Case (1891) (supra), as well as in the later cases of *American Refrigerator Transit Co. vs. Hall,* 174 U. S. 70, 19 S. Ct. 599, 43 L. ed. 899 (1899); *Union Refrigerator Transit Co. vs. Lynch,* 177 U. S. 149, 20 S. Ct. 631, 44 L. ed. 708 (1900); *Union Refrigerator Transit Co. vs. Kentucky,* 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 (1905); *Union Tank Line Co. vs. Wright,* 249 U. S. 275, 39 S. Ct. 276, 63 L. ed. 602 (1919) and *Johnson Oil Ref. Co. vs. Oklahoma,* 290 U. S. 158, 54 S. Ct. 152, 78 L. ed. 238, (1933) the United States Supreme Court has uniformly held that where a corporation brings into a state **other than the one granting it the corporate charter,** a portion of its movable property to therein employ and use the same in the conduct of its business operations for

profit, carried on as one entity, in more than one state, such permanently established portion may be constitutionally taxed in said second state, by resorting to the generally adopted and approved method of first valuing as a unit the entirety of the taxable corporate property employed in the interstate operations, taking into consideration the uses to which it is put and all elements making up its aggregate value, and then ascertaining what proportion of the corpus may be fairly taxed as being within the bounds of the State in interest, without violating any Federal restriction.

Certainly the principle involved in the same, whether it be railroads, airlines, motor freight lines or inland barge lines. Obviously there is a physical distinction but there can be no legal distinction as to the tax principle involved.

It must be remembered that this is not a tax on the right to use a navigable stream. This watercraft is constantly and regularly affixed to the **land** of the State of Louisiana and receives the same services as do strictly land transportation companies. True, the railroads use the land of the State, but this right-of-way is usually owned by the railroads. Thus they pay for the land and additionally they yearly pay taxes on the land owned. They are not using land owned by the State but owned by themselves, and yet they pay a proportionate tax on their rolling stock moving within and without the State over their land.

Here, the watercraft of these barge lines use the land belonging to the State, and yet they seek to escape their fair share of taxation because they use a free waterway when travelling. The States own the beds of all streams within their borders, as well as the adjoining batture. Thus, there is no logical reason to attempt to differentiate, as to these tax principles, between railroads and inland barge lines engaged in interstate commerce.

Evidently, because this particular issue has never been decided by this Court, the Circuit Court of Appeals felt it necessary to rely on the decisions in the old steamship cases, which are clearly distinguishable from the issues here. Those isolated vessel cases cannot be a sound basis for deciding an issue involving many towboats and barges engaged as an entity constantly and regularly, over fixed routes, in interstate commerce, as part of an integrated system of inland transportation. Unless many of those old steamship cases were decided in the manner in which they were decided, it may have resulted, as this Court has said "in an entire escape from taxation". *Southern Pacific Co. v. Kentucky* (1911) 222 U. S. 63, 32 S. Ct. 13.

In **every** steamship or vessel case cited by the Court of Appeals in support of its findings, there was shown to be a **real** residence or an **actual** domicile of the owner, and thus the Court was able to find an actual "situs" of the vessel for the purpose of taxation. But not one case was cited, nor can any be cited, where the "domicile" of the owner was a mere resting place of the charter, and such a state held to be the "situs" of movable property.

Then, to hold, as the Circuit Court of Appeals has held here, that Delaware could tax this watercraft of the American and Mississippi Valley Barge Lines, is untenable. It would result in a complete escape from taxation. This Court has never yet held that a State, which is merely the resting place of a charter, could tax property outside such State, when such corporation (1) does no business in the State of incorporation, (2) has no office there, but has only an agent for the service of process, (3) has never sent its vessels there, (4) operates its entire business from offices located elsewhere, (5) pays no taxes there, and (6) has no stockholders nor officers resident there.

This issue is being here presented for the first time.

Certainly, Delaware "can afford no substantial protection to the property taxed and cannot effectively lay hold of any interest in the property to compel payment of the tax". *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *Frick v. Pennsylvania*, 268 U. S. 473, 489 et seq.

Yet this watercraft cannot legally escape taxation everywhere!

As to the Union Barge Line Corporation, even if its domicile, Pennsylvania, should choose to tax this watercraft, there is no constitutional prohibition against Louisiana exacting its share upon that portion of the corpus always within its borders—even if it resulted in double taxation! This Court, in the case of *State Tax Commis-*

sion v. Aldrich (1942), 316 U. S. 174, 62 S. Ct. 1008, could not find any prohibition against double taxation of intangibles in either the Fifth or the Fourteenth Amendments to the Constitution, and it intimated the same thing with regard to tangibles in *Northwest Airlines, Inc. v. Minnesota* (1944), 322 U. S. 292, 64 S. Ct. 950, 952, when it said:

> "The fact that Northwest paid personal property taxes for the year 1939 upon some proportion of its full value of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. The taxation of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us."

The case of *Northwest Airlines, Inc. v. Minnesota (supra)* throws some interesting illumination on the issues presented here as to the Union Barge Line Corporation. That case involved airplanes flying through several states. If the right to use navigable waters is free, consider how much more free is the use of the air. The air routes are not near so fixed and definite as this watercraft on inland streams. As the Government of the United States controls the use of navigable waterways, it also controls air travel (Civil Aeronautics Board).

Yet, while this Court held that Minnesota, the actual and real domicile, had the right to an *ad valorem* tax on this aircraft, it refused to rule that non-domiciliary states could not tax a portion of the same aircraft, holding that this particular issue was not then before the Court.

The Union Barge Line case here, presents the issue now.

The American Barge Line and Mississippi Valley Barge Line cases herein, present an even stronger issue in favor of the right of Louisiana and New Orleans to tax in accordance with the Louisiana law, because the state of domicile (Delaware) under the established jurisprudence, has never been given the right to tax under these circumstances.

The importance of having these new issues decided now, by this Court, cannot be over-emphasized!

IF NECESSARY TO BE SHOWN, THE ADMITTED, UNDISPUTED FACTS SHOW A DEFINITE AVERAGE NUMBER OF THIS WATERCRAFT IS IN LOUISIANA EVERY DAY IN THE YEAR, THUS CLEARLY ESTABLISHING A SITUS FOR THE PORTION SOUGHT TO BE TAXED.

The facts are not in serious dispute here. The schedules, movements, and routes of this watercraft were all adduced from plaintiff companies themselves.

The undisputed evidence shows that the towboats of each of these Lines come into New Orleans, once a week or oftener, with a string of barges, throughout the year. The towboats tie off the string of barges and as soon as a northbound tow is made up, the towboats proceed back up the Mississippi River. The barges left behind in New Orleans are unloaded, re-loaded, or transferred to other carriers for further movement. Before the first string of

barges is ready to move back up the River, another tow-boat of the same Line is back with another string of barges to be left behind. Thus, from this constant overlapping, the record clearly shows that an average number of this watercraft is in New Orleans every day in the year.

Obviously, then, Louisiana is the permanent situs for this average number of watercraft within its borders constantly. Never, for one day in a year, is all this watercraft absent from Louisiana!

If necessary, then, to show a permanent situs for an average portion of this watercraft, this record clearly shows it for each of these three Barge Lines.

Also, there is no difficulty whatsoever in fixing the mileage in Louisiana, as compared to the total mileage of the whole system. These barge lines run over fixed routes on inland waterways, and the mileage of these routes is as fixed and definite as any other interstate transportation company.

CONCLUSION.

The levying of these taxes on the proportionate mileage basis by the State of Louisiana and the City of New Orleans, violates no provision of the Constitution of the United States and certainly does not constitute the taking of property without due process of law, as held by the United States Circuit Court of Appeals. Taxes levied under this Louisiana statute result in fair and just taxation; prevent a pyramiding of taxes; banish the twin

specters of exemption from taxation and multiple taxation; and should now be held constitutional by this Court.

To allow the judgment of the Circuit Court of Appeals to stand will nullify these provisions of the Louisiana Statute and hold it invalid as to these *ad valorem* taxes.

We therefore respectfully urge that a writ of certiorari should be granted.

Respectfully submitted,

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